IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION MDL. NO. 2406	Master File No. 2:13-CV-20000-RDP This document relates to: Subscriber Track cases [UNREDACTED – CONTAINS OUTSIDE COUNSEL ONLY MATERALS]

EXECUTIVE SUMMARY OF THE EXPERT REPORTS OF DR. DANIEL RUBINFELD AND DR. ARIEL PAKES

Expert Report of Dr. Daniel Rubinfeld

1. Daniel Rubinfeld is the Robert L. Bridges Professor of Law and Professor of Economics Emeritus at the University of California, Berkeley and Professor of Law at NYU. He received his Ph.D in economics from M.I.T. in 1972. He served as Deputy Assistant Attorney General at the Antitrust Division of the U.S. Department of Justice from June of 1997 through December of 1998. Dr. Rubinfeld is the co-author of two standard economic textbooks: *Microeconomics* and *Econometric Models and Economic Forecasts*. He has testified extensively in antitrust cases before both federal courts and agencies. He previously presented a declaration to this Court in support of the Subscriber Plaintiffs' (and in opposition to Defendants') motions for summary judgment. *See* SX316 (Doc. 1436-100).

2. His assignment in the present context was to offer his opinion as to whether economic evidence and methods used to prove liability and anticompetitive impact are common to members of both the proposed Nationwide Injunctive Relief Class and the proposed Alabama Damages Class, as defined in the Subscriber Plaintiffs' motions and in his report. He does not opine on the calculation of damages for the Alabama Damages Class, a task being undertaken by a separate expert, Dr. Ariel Pakes.

3. In undertaking his analysis, Dr. Rubinfeld relied on the Court's prior ruling that the Blue Cross Blue Shield Association's ("BCBSA") rules on Exclusive Service Areas ("ESAs") and National Best Efforts ("NBEs") are subject to a *per se* standard of antitrust liability. *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241 (N.D. Ala.), *permission to appeal denied*, 2018 WL 7152887 (11th Cir. Dec. 12, 2018). In carrying out his assignment, Dr. Rubinfeld studied numerous prior pleadings, briefs, and expert reports, as well as many documents produced, and depositions taken, in this case.

4. Dr. Rubinfeld's ultimate conclusions are that, based on his professional opinion and consistent with fundamental economic principles, the potential adverse effects of the ESAs and NBEs include: (a) higher insurance premiums; (b) lower quality service; (c) a reduction in output; (d) less innovation; and (e) fewer choices among insurance providers both as to services and products. Rubinfeld Report ¶21. He finds that these potential adverse effects can be evaluated on a classwide basis with respect to the both the Nationwide Injunctive Relief Class and the Alabama Damages Class. *Id.* ¶22.

5. **ESAs and NBE:** As Dr. Rubinfeld explains at length, quoting extensively from BCBSA and Blue Plan documents, common evidence can be used to show that ESAs impose a horizontal restraint that is a prohibition on competition based on geography. *Id.* ¶¶69-73. This restraint inhibits innovation and consumer choice and results in a combination of higher premiums and restricted growth to members of the Subscriber Classes. *Id.* ¶¶142-161. He finds that common evidence demonstrates that the Blue Plans themselves recognized that the ESAs limit competition. *Id.* ¶74.

6. Dr. Rubinfeld also finds that common evidence demonstrates that ESAs interact with NBEs to drastically limit Blue Plans' abilities to grow on an unbranded basis. *Id.* ¶¶78-82. Again, Dr. Rubinfeld cites to common evidence from BCBSA's own documents consistent with a finding that BCBSA was deeply concerned about Blue Plans circumventing the ESAs and competing in each other's ESAs on an unbranded basis, a risk that was reduced by the creation of NBEs. *Id.* ¶¶42-59. Dr. Rubinfeld cites to the real-world example of the recent Anthem/Cigna merger trial to demonstrate through common evidence how the NBE limits unbranded growth and disincentivizes investment in unbranded business that could compete with Blue Plans. *Id.* ¶¶83-105.

7. **Alabama Damages Class**: Dr. Rubinfeld finds that each element of a restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C.§1) can be proven with common evidence. *Id.* ¶¶114-61. He finds that common evidence can be used to show that both of these restraints are agreements to limit or eliminate competition among Blue Plans that apply to all members of the Subscriber Classes. *Id.* ¶119, 125. He further finds that common evidence can be used to show that all of the Blue Plans admit that they have entered into an agreement to allocate geographic territories through ESAs, and further admit that they have agreed to enact NBE rules limiting unbranded competition. *Id.* ¶120-22. Dr. Rubinfeld finds that there is common evidence that all Blue Plan defendants, including Blue Cross Blue Shield of Alabama ("BCBS-AL"), are subject to these restraints. *Id.* ¶¶40, 60, 119.

8. Dr. Rubinfeld finds that there is common evidence that is consistent with an economic finding that, absent the restraints, other Blue Plans would have entered the Alabama market, whether on a Blue of Green basis, and offered health insurance to the Alabama Damages Class. *Id.* ¶¶126-30. BCBSA and Blue Plan documents describing Blue Plans' concerns that entry by rival Blue Plans would occur but for the imposition ESAs is common economic proof that Blue entry would have occurred. *Id.* ¶127. Similarly, documents produced in this litigation indicate that entry by rival Blue licensees on a "Green", or unbranded, basis would have occurred but-for the National Best Efforts restrictions is common economic proof of Green entry. *Id.* ¶130.

9. Dr. Rubinfeld also finds that, based on common economic proof, the restraints caused antitrust injury in the form of higher premiums, lack of additional health insurance products, and loss of innovation, citing real world examples from the Anthem-Cigna merger trial

in 2017 (and satellite litigation between Anthem and Cigna that went to trial in 2019). *Id.* ¶¶138-161; *id.* ¶¶83-105.

10. **Nationwide Injunctive Class**: Dr. Rubinfeld finds that a nationwide injunctive class is supported by common economic proof. First, he finds that common evidence is consistent with the nationwide uniformity of application of the challenged restraints to all Blue Plans, such that the Blue Plans act in a manner generally applicable to the nationwide injunctive class. *Id.* ¶¶165-66. Second, Dr. Rubinfeld finds that removal of the restraints would provide the benefit of more competition to the class as a whole. *Id.* ¶167.

Expert Report of Dr. Ariel Pakes

1. Ariel Pakes is the Thomas Professor of Economics in the Department of Economics at Harvard University, where he teaches courses in Industrial Organization, the Economics of the Health Care Industry, and Econometrics. He received a Ph.D from Harvard in 1979 and is the recipient of numerous professional awards, both in the United States and elsewhere. His research has focused on developing methods for empirically analyzing responses of markets to institutional and policy changes. He has authored a number of the seminal papers in this area (*see, e.g.*, Kate Ho and Ariel Pakes, "Hospital Choices, Hospital Prices and Financial Incentives to Physicians," *American Economic Review* 104, no. 12 (2014): 3841-84; Kate Ho, Ariel Pakes, and Mark Shepard, "The evolution of health insurer costs in Massachusetts, 2010–2012," *Review of Industrial Organization* (2018): 1-21), as well as other recent papers focused specifically on healthcare markets. In addition, he has mentored over sixty students, many of whom are now leading researchers in Industrial Organization and related fields at prestigious institutions.

2. Dr. Pakes was asked by counsel for Subscribers to examine and model entry by Blue Plans into the state of Alabama (in which BCBS-AL now possesses a dominant market share) in a but-for world where the ESAs and the NBE did not exist. Dr. Pakes then calculates the resulting damages to members of the proposed Alabama Damages Class, broken down by individual, small group (2-50 employees) and medium group (51 to 200 employees) segments, as described in the relevant class certification motion and in Dr. Pakes' report. Pakes Report ¶¶18-26.

3. **Entry into Alabama:** Dr. Pakes finds that common economic evidence establishes that, absent the ESAs and NBE, one or more Blue Plans would have entered BCBS-AL's ESA, either on a Blue-branded or unbranded "Green" basis. *Id.* ¶5.

4. First, Dr. Pakes finds that the Alabama marketplace is highly concentrated due to BCBSAL's exceptionally large market share. *Id.* ¶¶27-40. He finds that BCBS-AL was highly profitable during the proposed Alabama Damages Class period (April 17, 2008 to December 31, 2013). *Id.* ¶¶41-48. He further finds that BCBS-AL offered a limited set of insurance products to its customers and did not use methods of paying providers which have proven cost effective. *Id.* ¶¶62-78. The absence of a variety of products and of cost-effective policies in the Alabama market would have made entry attractive to potential competitors. *Id.* ¶¶61, 71.

5. Moreover, Blue Plans not currently operating in Alabama had both the desire to expand into other geographies and the assets, infrastructure, and experience to successfully enter Alabama. *Id.* ¶¶106-124. This is true whether or not the entry would have been as a "Blue" or "Green" health insurer. *Id.* ¶¶125-26. In particular, Anthem (via BCBS-GA, a neighboring Blue Plan) was a particularly likely entrant. *Id.* ¶¶142-46.

6. **<u>Benefits of Competition</u>:** Dr. Pakes also finds that, absent ESAs and NBEs, entry into the Alabama market would increase competition among insurers. *Id.* ¶7. As Dr. Pakes notes, it is a fundamental precept of economics that entry disciplines prices (for the Subscriber Plaintiffs, premiums), thus preventing firms from obtaining supernormal profits. *Id.*; *see also id.* ¶150-52. He opines that by preventing entry and reducing competition, ESAs and NBEs have harmed consumers.

7. Dr. Pakes finds that restraints on entry have non-premium economic effects as well. *Id.* ¶8. Competition has the effect of encouraging innovation, and barriers to entry both dull the incentives for the incumbent to innovate and bar innovative firms from entering the market. *Id.*; *id.* ¶¶82-84. These barriers also limit the choices available to populations of consumers with different needs. *Id.* ¶85. When Dr. Pakes, calculates the likely effect of entry into the Alabama

market on Subscriber premiums, he notes that his calculation does not consider the additional benefits of innovation and product diversity that would likely accompany entry. *Id.* ¶86. As a result, Dr. Pakes' estimates provide a lower bound to the likely benefits of entry. *Id.; see also id.* ¶267.

8. **Modeling the Effects of Entry**: To calculate the impact of entry on premiums, Dr. Pakes uses the two analytical frameworks that have dominated the economic literature of the effects of competition on premiums: (1) a reduced form analysis and (2) structural methods. *Id.* ¶9.

9. The reduced form approach uses regression analysis to examine the relationship between insurer concentration and premiums. *Id.* ¶149. It provides a set of coefficients that relate the characteristics of the market in different regions (including measures of concentration) to premiums for coverage in those regions. *Id.* ¶10. Dr. Pakes uses the model and coefficients estimated by Erin E. Trish and Bradley J. Herring ("How do health insurer market concentration and bargaining power with hospitals affect health insurance premiums?," *Journal of health economics* 42 (2015): 104-114) which is the most detailed published reduced form analysis of health insurance markets of which Dr. Pakes is aware. *Id.* ¶92. He applies this model to the relevant characteristics of the Alabama market prior to and after entry to calculate the resulting change in premiums. *Id.* ¶¶93, 153-69.

10. Dr. Pakes' reduced form model provides common evidence that, for the Alabama Damages Class, premiums for all or virtually all Class members would fall by about 3.4% to 5.5% upon entry, depending upon the market share attained by the entrant, with the smaller impact resulting from an entrant that obtains a market share of 20% and the larger impact from an entrant that obtains a 45% market share. *Id.* ¶¶157, 163, Table 17.

11. Dr. Pakes also conducts a structural analysis of entry. He uses Alabama-specific data and a behavioral economic model of the relationships among the participants in the health insurance market in Alabama to predict what premiums would have been had there been entry. *Id.* ¶¶95-99, 170-71. The structural model follows the most detailed published structural model of the health insurance available, that of Kate Ho and Robin S. Lee. *See* "Insurer competition in health care markets," *Econometrica* 85, no. 2 (2017): 379-417. *Id.* ¶173.

12. Dr. Pakes models entry on both a Blue and a Green basis. For each, he estimates Alabama-specific models of consumer demand and health care costs, then uses the estimated model to calculate premiums before and after entry of the Blue or Green plan. *Id.* ¶¶206-50. Using this approach, he finds that entry would reduce premiums for all or virtually all of the Subscriber Class. ¶270.

13. These premium reductions are consistent with the results of the reduced form analysis, which provides a cross-check on Dr. Pakes' structural model. Dr. Pakes calculates total damages in excess of $400 million. *Id.* Tables 28 & 29.

14. Based on Dr. Pakes' analysis, he opines that all or virtually all of the Alabama Damages Class was injured by the restraints on entry of the BCBSA. *Id.* ¶12.

This the 15th day of April, 2019

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I hereby certify that on April 15, 2019, the foregoing was manually filed under seal with the Clerk of Court, and was served via electronic mail on the following counsel for other Defendants who have been designated to receive service through agreement of the parties. A redacted version was served on all counsel of record via CM/ECF.

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